PUBLIC PROSECUTOR

v.

LEE SAM THYE & ANOR.

HIGH COURT MALAYA, PENANG
MUSTAPHA HUSSAIN JC
[CRIMINAL TRIAL NO. 8 OF 1979]
26 AUGUST 1982

CRIMINAL LAW: *Dangerous Drugs - Trafficking - Morphine - Drugs found inside car - Whether safe to presume or infer custody or even knowledge of things inside the car on the person who borrowed - Duty of Court when there are more than one inference.*

On 26 November 1978 at or about 1.15 a.m the first accused, the husband of the second accused was driving a motorcar while the second accused was seated next to him at the front passenger seat. The car belongs to the mother-in-law of the first accused and he borrowed it the previous day at or about 5 p.m. When the car stopped at the Raja Uda Pier, Georgetown the accused were told to drive the car with two members of the police party to the police headquarters without any stoppage or interference.

At the police headquarters, a search was made of the car and two paper bags which contained the morphine were recovered from underneath the front passenger seat.

Both the accused were charged for trafficking in dangerous drugs to wit, 'morphine' weighing 2,451.16 grammes in contravention of s. 39B (1)(a) an offence punishable under s. 39B(2) of the Dangerous Drugs O. 30/52 to read with s. 34 of the Penal Code.

Held:

[1] It is highly dangerous to presume or infer custody or even knowledge of the things inside the car on the person who borrowed a car from another.

[2] The Court was of the view that it was not for the first accused to prove that the offending articles were not there when he borrowed it; it is not for the defence to explain and clear this doubt. The old established principles of strict proof on the prosecution can never be relaxed. It is not for the defence to clear any doubts or bridge any gap in the prosecution case.

[3] As there are more than one inference, it is trite law that the inference favourable to the first accused was to be taken.

[4] This Court cannot presume or infer knowledge on both the accused persons in the particular circumstances and facts of this case.

[5] On the evidence of the prosecution as a whole, this Court finds that the prosecution had not made out a *prima facie* case against both the accused persons. The Court therefore acquitted and discharged both the accused.

[Acquitted & Discharged without calling for the defence.]

Cases referred to:

Syed Ali b. Syed Abdul Hamid & Anor. v. PP [1982] CLJ (Rep) 340
Sia Soon Suan v. PP [1966] MLJ 116
R. v. Khoo Guan Teik [1957] MLJ 128
Haw Tua Tau's case [1981] CLJ (Rep) 11

Legislation referred to:
Dangerous Drugs Ordinance 1952, ss. 27(d)(da), 39B, (2)
Penal Code, s. 34

For the public prosecutor - Abd. Hamid Embong, DPP, Penang
For both the accused - Ghazi Ishak (Balwant Singh with him)

JUDGMENT

Mustapha Hussain JC:

Both the Accused persons were charged:

> That you on 26 November 1978, at about 1.15 a.m., at Raja Tun Uda Pier, Weld Quay, in the District of Georgetown, in the State of Penang, in furtherance of the common intention of you all, did on your own behalf traffic in a dangerous drug to wit `Morphine weighing 2,451.16 grammes in contravention of the provisions of paragraph (a) of Sub-section (1) of s. 39B of the Dangerous Drugs Ordinance 30/52 and thereby committed an offence punishable under s. 39B (2) of the said Ordinance to read with s. 34 of the Penal Code.

What are the evidence adduced up to this stage, i.e. at the close of the prosecution case.

The Accused persons in this case are husband and wife. When the car was stopped at the Raja Uda Pier on 26 November 1978 at about 1.15 a.m. the first accused (the husband) was at the driving wheel of the car and the second accused (the wife) was seated at the front passenger seat. There, they were told to drive the car with two members of the police party to the police headquarter in a convoy without any stoppage or interference.

At the car park behind the police headquarter, a search was made of the car and from underneath the front passenger seat, the offending articles (i.e. the two paper bags in which were the morphine) were recovered. There was no specially constructed compartment under the front passenger seat.

We also have evidence to show that the car belongs to first accused's mother-in-law (i.e. Accused 2's mother). First accused borrowed the car at about 5.00 p.m. the day before. The car was a sort of family car which many people have been using, including neighbours. That, briefly, is the case adduced by the Prosecution.

The first thing for consideration of the Court is whether the charge is proper. The car together with the two accused persons were stopped at the Raja Uda Pier but the offending articles were recovered at the Police HQ car park. It is the view of the Court that the charge is proper as the recovery of the offending articles relate back to the first stoppage at the Raja Uda Pier.

From Raja Uda Pier the car together with the two accused persons were escorted to the police headquarter car park where the search and recovery were made. It has not in any way prejudiced the defence in any way.

The second consideration for the Court to make is whether a *prima facie* case has been made out against both the accused persons or either of them.

As it was not a specially constructed compartment in the car from which the offending articles were found, as the car is not a premises, and that the car itself is not "anything containing", no statutory presumptions can be invoked in this case - [*Syed Ali b. Syed Abdul Hamid & Anor. v. PP* [1982] CLJ (Rep) 340].

The prosecution has therefore first to prove custody and control of the two paper bags (P3 A & B) before the presumptions (d) and (da) of s. 27 can be invoked. "Custody and Control" has been held to mean:

> Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.

In this case, it is clear that many people were using the car. When first accused borrowed it at 5.00 p.m. there was no evidence that the two paper bags were already there under the front passenger seat or not. Can a borrower of a car belonging to another person (whether mother-in-law or a friend) be deemed to know what things are inside the car, what are the things inside the glove compartment or under the seat or in the boot? It will be highly dangerous to presume or infer custody or even knowledge of the things inside the car on the person who borrowed a car from another. It would be otherwise if the car belongs to the accused himself. On the facts of this case the Court is in doubt, and a grave one at that, whether the offending articles were already there under the seat before first accused borrowed it. It would be otherwise had the prosecution adduced evidence that the car was empty before first accused borrowed it. This Court is of the view that it is not for the first accused to prove that the offending articles were not there when he borrowed it eight hours earlier; it is not for the defence to explain and clear this doubt. The old established principles of strict proof on the prosecution can never be relaxed. It is not for the Defence to clear any doubt or bridge any gap in the prosecution case *Sia Soon Suan v. P. P.* [1966] MLJ 116.

It is contended by the prosecution that both the accused persons should have seen the offending packages. Going through the evidence, the prosecution witnesses in the beginning were strenuously attempting to say that the two paper bags were concealed and completely hidden under the front passenger seat. The defence cross-examined to establish that they were not hidden and later on the prosecution witness (PW1) said when the car door was opened the packages could be seen and thus the prosecution wants the Court to presume knowledge.

When the Court visited the car at the central police station, PW1 demonstrated how he first found the two packages. About 2" of the packages was protruding from under the seat after some effort by PW1 to push the two packages under the seat. In view of PW1's evidence of the taking of the red sweater from the second accused that very night which was completely contradicted by the investigating officer who took the sweater personally from the second accused six days later at Dato Kramat police station, the Court is in two ways whether to be sure if PW1's evidence as to the two packages whether they were completely concealed (as he wanted the Court to believe in his examination-in-chief or otherwise in his cross-examination and demonstration at the car park). Assuming for the moment that a portion of the two packages could be seen when the passenger door was opened, could it be seen by the driver, i.e., the first accused, when he was driving the car that night?

Can it be inferred that the first accused could have seen it from where he was? Or could it be inferred that accused could not see the packages? As there are more than one inference it is trite law that the inference favourable to the first accused is to be taken.

As regards the second accused: When did she come to sit on the front seat of the car? There was no surveillance kept on the movements of the car and who were inside it before it was stopped at 1.15 a.m. at Raja Uda pier. Can one safely say that when second accused

opened the front door to sit on the front seat, she would have seen the protruding part of the paper bags? This Court cannot presume or infer knowledge on both the accused persons in the particular circumstances and facts of this case. Even if knowledge is to be inferred, the fact that the car belongs to someone else (albeit one's own mother-in-law) does not, by itself, mean control or custody of the things. To hold otherwise, in the view of this Court, is to create a highly dangerous precedent for anyone who happens to borrow a car from another in which can be found offending articles.

The conduct of both the accused persons, especially of the first accused by driving the car to the police headquarter after being stopped at Raja Uda pier and the absence of any evidence that both the accused's faces were pale, or felt frightened, are consistent with their innocence.

Then again there is a *hiatus* in the evidence relating to retention and custody of the exhibits P3 A & B and P2 A & B. There is evidence that the OC of the anti-drugs handed over the exhibits to the IO who handed these exhibits to another officer before - *R. v. Khoo Guan Teik* [1957] MLJ 128.

Again, we have the date in the Chemist Report which the DPP agreed is a mistake.

Taking the evidence of the prosecution as a whole, this Court finds that the prosecution has not made out a *prima facie* case against both the accused persons, or in the words of their Lordships in *Haw Tua Tau's* case [1981] CLJ (Rep) 11, the evidence did not establish any essential element in the alleged offence to justify calling for their defence.

I therefore acquit and discharge both the accused.

Also found at [1982] CLJ 489